

DEP



## citizens' bulletin

TELEPHONE 566-3489

ELIZABETH JESTER, EDITOR

VOLUME 1 NUMBER 4

JANUARY 1974

TIDAL WETLANDS - RYKAR

The first court case challenging Connecticut's tidal wetlands law has been decided in favor of the state and its authority to protect the valuable coastal areas, though the court limited itself to a somewhat narrower consideration than many people wished.

The decision, made by Judge Leo Parskey of the Superior Court at Hartford, dismissed an appeal by the Rykar Industrial Corporation of Stratford. Rykar had submitted an application to fill and develop 227 acres of the Great Meadows Marsh in Stratford and Bridgeport. The fill would consist of 1,800,000 cubic yards dredged from Lewis Gut. The dredged area would be used as a deep harbor facility.

The application was denied in February 1971 by the Commissioner of Agriculture and Natural Resources (who then had jurisdiction over tidal wetlands) under Sec. 22-7j of the General Statutes - part of the 1969 Connecticut Tidal Wetlands Act. Rykar appealed the decision, filing suit against the State of Connecticut and several private environmental organizations which had vigorously advocated denial of Rykar's application at a public hearing. The company claimed \$77,780,000 compensation for loss of rights.

The Superior Court decision dismissed Rykar's appeal, in doing so creating a precedent for future wetlands decisions, clarifying some issues and avoiding others.

The decision clearly recognized the importance of the contested wetland as a public resource. "The Great Meadows salt marsh serves a variety of ecological and hydrological purposes. Whereas in the past it was thought that the major product of this and other high water marshes was a sedge that was valuable only for bedding and manure, we now know that salt marshes have a much greater value. As hydrologic sponges they absorb large amounts of water during severe tides, thus containing the spread of flood waters. As balance wheels in the ecosystem, they sop up excess nutrients for later release when the nutrient supply is low. As sedimentary catch basins, they serve as natural depositories for accumulations of sediment brought in by the tide, thus keeping the channels free for navigation. As nurseries, they supply nutrients to shell-fish, crustaceans and other marine life. As natural refuges they act as habitats for wild life and as a way station for migratory waterfowl. For all these reasons, it is obvious that the state has a great stake in the preservation of tidal marshland."

The decision also recognized that public rights may prevail over private rights by stating that "Although the upland owner does have certain littoral rights, this does not mean that he is free to exercise these rights without let or hindrance. Nor does it mean that he can exercise dominion over the soil as though he were the true owner. His littoral rights are subject to reasonable police regulation in the interest of the public welfare."

The court held that the Commissioner's original decision was a reasonable exercise of police power because Rykar was not denied access to deep water by the decision, as such access could be achieved by wharfing out rather than by filling. Said the decision, "The crucial question in this case is whether the denial of the present application deprives Rykar of its right of access to deep water. If access can be accomplished some other way, such as by wharfing out rather than by filling, then it cannot be said that it was an unreasonable exercise of the police power for the commissioner to foreclose the method which would destroy the marsh. The fact that wharfing out may be more costly is not of constitutional significance. Since no evidence was offered before the commissioner ruling out wharfing as a reasonable alternative, it cannot be said that the commissioner was arbitrary in denying the present application to fill whether all or only a portion of the wetland is involved. Until it appears that Rykar has been denied access to deep water, it cannot be said that there has been an unconstitutional taking of its property without just compensation."

The issue of whether the state's right to deny permission to fill constitutes a taking in the constitutional sense was not considered. The Rykar case is not, therefore, a complete test of the state's tidal wetland authority. The Court ruled that it could not retry the Rykar case, but act only on the evidence of the record before it - and that evidence was equivocal as to whether Rykar actually owned a portion of the wetland. Rykar claimed a substantial portion of the wetland lies above ordinary high water, and was therefore Rykar-owned upland. The Commissioner found it to be tidal wetland, but his finding was found by the court to be unclear.

The Court thought this unclear decision suggested a remand to the Commissioner for an additional finding, but suggested such a remand would be merely an academic exercise due to an inconsistency it found in the original Rykar application. When and if Rykar submits an appropriate application defining exactly its claimed rights to both upland and submerged wetland will be "time enough to wrestle

with the constitutional questions involved", according to the Court.

Rykar has appealed the decision to the Connecticut Supreme Court, so the case is not closed.

At present, however, it is clear that the courts recognize the public value of this wetland, will uphold that public value over a lesser private ownership claim, and uphold reasonable exercise of police power to support that public claim.

#### TIDAL WETLANDS - BRECCIAROLI

The Rykar case is notable for the magnitude of damages claimed as well as for being the first test of the tidal wetlands law. Hard on its heels, however, came an even more significant ruling.

December 17, the Court of Common Pleas in Hartford County denied applicant Dante J. Brecciaroli's appeal from a decision of the Commissioner of Environmental Protection. The Commissioner denied Brecciaroli's February 1972 application to fill 5.3 acres of designated wetland which the applicant owned in Guilford.

In appealing the decision, Brecciaroli alleged that the Commissioner's action was improper, arbitrary, unsupported by the record, an unreasonable exercise of police power, and amounted to a taking of his land without compensation contrary to the state and federal constitutions.

The Court of Common Pleas, after a significant discussion of public and private property rights disagreed, denying the appeal.

According to the Court, "It is axiomatic that all property is subject to the reasonable exercise of the police power...and that courts will not interfere with a legislative exercise of this power unless the act complained of serves no legitimate purpose or is clearly unreasonable, arbitrary, discriminatory or illegal...Further, courts will not substitute their judgment for the legislative judgment in regard to specific legislation which may result in the restricting of the use of private property or in the practical taking of it without compensation, if the issue is debatable...

"The legislation in establishing [the policy of protection for tidal wetlands] based on the power of the state to promote the public health and welfare, recognized that it must be balanced against the common law right to free use of property. It therefore provided that in particular situations, where the harm to result to the public health and welfare from some proposed activity upon "wetland" areas was deemed to be minimal, some further invasion thereof could be permitted, but in other cases, where the resulting harm would be deemed too great, it would be refused...and further provided that the commissioner could grant, deny or limit a permit for such activity and for the judicial review of the reasonableness of his decision...

"In so doing, the legislature recognized that in every situation where a denial was involved, there would be some taking of private property for a public use, but it did not intend every such denial to result in giving the property owner the power to force the state to acquire his property under Sec. 48-12 through 48-14 of the General Statutes or the judicial review provision as to reasonableness would be rendered meaningless...Many federal and state courts have, in particular situations, upheld ordinances, regulations and statutes providing for a taking of private property without compensation and in so doing have justified their decisions by diverse standards or theories."

The decision then discusses various theories justifying the constitutionality of regulation of private property, citing Connecticut precedents and adding "All of these justification theories have come into being because courts have understood the necessity of striking balance between private property rights and the public interest. It has become increasingly apparent to them that it would impose an impossible burden on the state for the law to insist that it acquire every privately owned natural resource which is threatened with destruction or despoilation by some activity of its owner. As Justice Holmes saw so clearly in 1922, 'government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'"

The Court continued "It is reasonable and in accord with the law of this state that this appellant be allowed some feasible and practical use of his property...Nevertheless, the fact that the specific exercise of the police power prevents the enjoyment of certain of the appellant's right in his property without providing compensation therefor does not necessarily constitute a taking without just compensation...

"The test of a constitutional exercise of the police power must be determined in light of the circumstances shown to exist in the particular case...and the ultimate question here is was the commissioner's action in denying this application so unreasonable and confiscatory as to amount for all practical purposes to a taking of the plaintiff's property for a public use without just compensation?...

"In the court's opinion, the commissioner's action does not amount to a taking in the sense referred to in the Bartlett [precedent case cited] decision. Every legislative restriction of an owner's use of his property represents some loss of his total dominion over it. The court does not interpret the commissioner's decision as holding that this appellant is precluded from filling any part of his wetland, only that the portion requested is too great in light of the declared legislative policy for these areas. Clearly, if the commissioner refuses to allow the applicant to fill any of this wetland, a total taking in the Bartlett sense would occur and the state would be required to compensate the property owner."



LAND USE

DEP has issued an order to a construction company which could have great impact on land use in the state. The order, if upheld in the courts (an appeal has been filed in both state and federal courts) would affirm the authority of DEP to require land developers to take certain environmental concerns into consideration before developing.

The case concerns an order DEP issued to the Alwin Construction Company to prepare an engineering report and submit a plan indicating that its proposed subdivision development would be compatible with the natural resource limitations of the area to be developed; and to refrain from installing or applying for a permit to install a sewage disposal system or storm drain until the report is completed. (Though any individual who has purchased property in the subdivision may elect to perform the study for his own lot and apply for a permit on the basis of that study). DEP personnel had investigated the land to be developed and determined that construction of conventional on site septic disposal systems and other forms of development activity on the property could reasonably be expected to pollute the waters of the state. An order was then issued under Section 25-54K of the Connecticut General Statutes. The section states that an order may be issued to "any person... maintaining any...condition which reasonably can be expected to create a source of pollution to the waters of the state."

DEP holds that the developer is at present maintaining a condition which will eventually cause pollution, and that the day is long past when a subdivider can claim he is merely selling land. The department's brief states that "the results of (the developer's) activities are in truth indelibly impressed upon the physical pattern of the community at large."

The brief continues "the subdivider is uniquely able to discern, to examine and to correct pollution problems which are reasonably foreseeable if the development moves ahead. The subdivider is in the best position to study the foreseeable adverse environmental consequences of his development plan, and to correct them by altering the plan as necessary. The subdivider also has the legal control over the land to replat if larger lots would reduce the risk of pollution, or to implement other, tract-wide solutions to environmental problems."

The original DEP order was issued by former Commissioner Lufkin on February 7, 1973. The developer requested a public hearing on the order, which was held in seven sessions in April and May. The Department on the basis of those hearings reaffirmed its order September 26 and the developer has appealed.

COASTAL ZONE MANAGEMENT

Public discussions of criteria by which the Secretary of Commerce will evaluate state coastal zone management programs submitted to his approval under the Coastal Zone Management Act of 1972 will be held in seven locations across the country. The discussion for the New England (including Connecticut) and New York area will be held on January 17, 1974 at the Transportation Systems Center, U. S. Department of Transportation, 55 Broadway, Cambridge, Massachusetts from 9 a.m. to 5 p.m. The discussions are being held by the Office of Coastal Environment (OCE) of the National Oceanic and Atmospheric Administration (NOAA).

The 1972 Coastal Zone Management Act recognized the importance of coastal zone areas for the "present and future well-being of the nation", described the fragility of the areas and the many competing demands on them, and found that present state and local arrangements for planning and regulating land and water uses in these valuable areas were inadequate. The act makes provision for more effective protection and use of coastal land and water resources by encouraging states to exercise their full authority over the coastal zone. The encouragement takes the concrete form of monetary assistance to the states to develop and administer coastal zone land and water use programs.

The Secretary of Commerce is authorized to make grants for such programs once he approves them according to rules and regulations which he will promulgate. The public discussions will be on the criteria these regulations should contain. A working paper has been prepared to serve as a focal point for discussion; copies are available from OCE, U.S. Department of Commerce, Rockville, Md. 20852 (tel. 301-496-8526). Persons wishing to be heard at the discussions should also contact OCE at the above address or telephone; presentations will be limited to 20 minutes and no audio-visual equipment will be available. Written comments will be received at OCE on or before February 5, 1974.

DATA FOR LAND USE DECISIONS

The second series of workshops on the use of natural resource data by municipal land use decision makers will begin in February. The workshops, co-sponsored by DEP and the Cooperative Extension Service, are designed for conservation and planning and zoning commissions, inland wetland agencies, boards of selectmen, and other municipal officials who deal with land use and natural resource information. The course is given in four sessions and, over the course of two years, will have covered each town in the state. (Towns are assigned workshop dates in order of regional priority. Unfortunately, due to limited space only officials of the scheduled towns can be accommodated.)

In the first session, officials of each town will be given a summary of all the natural resource data available for their town, and will discuss the purpose and source of the data. In the second session, participants will learn to interpret, use and make data maps for themselves. The third session will cover use of the data in land use decisions, and the fourth session will continue the land use discussion with consideration of implementation of the decisions, once made.

The first session of the Spring '74 workshops will be given for North Stonington, Ledyard, Preston, Voluntown, Stonington, Groton at the North Stonington High School Library on February 5 (contact Russ Hibbard 887-1608); For East Hampton, East Haddam, Haddam, Durham, Middlefield, Middletown, Cromwell, and Portland at the Middlesex Extension Center on Feb. 12 (contact Greg Curtis 345-4511); Woodbury, Morris, Burlington, Harwinton, Litchfield, Bethlehem, Watertown, Thomaston, Plymouth at the Agricultural Center in Litchfield (contact George Sweeney 567-8288); and for Stratford, Bridgeport, Fairfield, Easton, Trumbull, New Haven and Monroe at the Hillcrest Junior High School in Trumbull (contact Howard Kemmerer 748-3523).

#### ENERGY

As this newsletter goes to press, the Environment Committee is holding a public hearing on legislative proposals to deal with the energy crisis. (Regrets that the Bulletin publication date couldn't allow for advance notice.)

The legislative proposals under consideration were drafted by the legislative sub-committee on Energy and will be modified by the Environment Committee in the light of comments at the public hearings.

The proposals drafted by the energy sub-committee are wide ranging.

Grant the Governor emergency powers to respond to energy shortages in the State, including the authority to implement federal programs and to ban display lighting.

Create a Connecticut Energy Board responsible for obtaining information regarding energy supply and demand projections, developing an energy budget and a long range energy program and making recommendations for action to the Legislative and Executive branches of government.

Modify the charter of the Public Utilities Commission to require the PUC to consider energy supply and conservation when it establishes rates and rate structures.

Require the posting of information in all retail establishments regarding the energy consumption factor of products for sale.

Require conservation measures such as modifying the State Building Code as it relates to insulation, ventilation and lighting, and provide incentives for public transportation.

Encourage a joint effort of industry, business and government by establishing an Energy Advisory Board designed to identify and promote projects for the development of new sources of energy, and recommend legislation to encourage the development of new energy sources.

Pass resolutions memorializing Congress concerning such subjects as rationing, the establishment of a National Safety Board, and changes in the Highway Trust Fund.

#### ENERGY EMERGENCY AGENCY

The legislative branch is holding public hearings on their energy proposals; the executive branch is equally active. December 12, Governor Meskill announced creation of a state Energy Emergency Agency to coordinate Connecticut's response to the national fuel shortage. Eckardt Beck, DEP Deputy Commissioner for Environmental Quality, was named Administrator.

The Energy Emergency Agency has newly established offices on the first floor of the State Armory in Hartford. The telephone will be manned 24 hours a day by experts able to answer citizen inquiries. The number is toll free: 1-800-842-9550.

Task Forces are being established to deal with various aspects of the energy shortage. Six executives from the private sector have already begun work on the Allocations and Contingency Planning Task Forces. Other groups are being established to deal with conservation, public information, economic dislocation, enforcement and special projects.

The Commissioners of Commerce, Consumer Protection, Environmental Protection, Transportation, Health and Labor, the Director of the Office of Civil Preparedness, the Chairman of the Public Utilities Commission and the Director of the Governor's Office on Energy Policy serve as members of the Advisory Board to the new Agency.

#### PESTICIDES

DDT and several other chlorinated hydrocarbons, products containing strychnine, cadmium, lead, mercury, thallium, and most arsenic products are among the pesticides which DEP proposes to ban for use in Connecticut. Several of these pesticides had been previously banned or restricted by both state and federal governments. This proposal will consolidate as well as add to past regulations.

The Department will hold two public hearings on its proposed regulations for registration and use of certain pesticides; Thursday, January 31 in Room 221 of the State Office Building at 7:30 p.m. and Thursday, February 7 at the Connecticut Agricultural Experiment Station, 123 Huntington St., New Haven at 7:30 p.m.



The proposed regulations deal with the persistent "hard" pesticides, including those containing certain chlorinated hydrocarbons or heavy metals. Both Federal and State legislation have recognized the harmful effects of the persistent pesticides, and their use has been increasingly restricted since the publication of Rachel Carson's Silent Spring caused the nation to take a hard look at the hard pesticides.

The proposed regulations will be supplemented by others in October of 1974, when the new Connecticut Pesticide Control Act takes effect. This act, passed by the state legislature in 1973, brings state law into conformance with certain Federal requirements set forth in the 1972 Federal Environmental Pesticide Control Act.

The Connecticut law effective in Oct. '74 will require that all pesticides sold in Connecticut be registered with DEP and classified in three categories: general use, restricted use or permit use. All commercial and aircraft applicators must be licensed by DEP, so must private applicators if they wish to use restricted pesticides.

The regulations under consideration at the upcoming public hearings will remain in force when the new law takes effect.

These regulations list pesticides which shall not be registered and shall be prohibited from use. These include: arsenic products except monosodium acid methanearsonate (MSMA), disodium methanearsonate (DSMA, MAA), cacodylic acid and its sodium salt; benzene hexachloride (BHC); cadmium products; dichloro diphenyl dichloroethane (DDD); dichloro diphenyl trichloroethane (DDT), dodecachlorooctahydro-1,3,4-metheno-1H-cyclobuta (cd) pentalene (Mirex); endrin; heptachlor; lead products; mercury products; phosphorous paste products; sodium fluoride; selenium products; sodium fluoroacetate (compound 1080); strychnine products; terpene polychlorinates (65 or 66% chlorine) consists of chlorinated camphene, pinene and related polychlorinates (Strobane); thallium products; toxaphene.

Aldrin and dieldrin shall be registered and used only for termite control; lindane shall be registered only for use as a paste for borer control or prescribed use on humans.

Pesticides except pyrethrum, activated by thermal means for indoor application shall not be registered or used except such pesticides intended for use in commercial greenhouses.

Captan shall not be registered for use or used on pets or other animals.

Chlordane products intended for indoor application shall be registered for use and used only by applicators licensed by the State. Chlordane products intended for use on pets or other animals shall be registered for use and used only by veterinarians licensed by the State of Connecticut. Chlordane products intended for indoor or outdoor application by mistblowers and other mist generators or thermal foggers shall not be registered for

use or used.

The proposed regulations also set forth conditions under which an experimental use permit for a restricted pesticide may be obtained and state that the commissioner may authorize use of any of the pesticides restricted by these regulations if he determines that such use is necessary to prevent undue hardship or if an emergency condition exists.

IN THE PAST MONTH...

#### KING'S MARK

The U.S. Department of Agriculture has formally approved western Connecticut's King's Mark Resource Conservation and Development Project. Under the project, a long range plan to protect the natural resources of the 47 towns in the region will be developed. Approval of the project carries with it a commitment of federal funding for the planning phase that could amount to as much as \$150,000.

Once the plan is formulated and approved, the individual conservation measures outlined in the plan will also be eligible for federal funding.

Key elements in the program will be: acceleration of soil surveys for proper urban growth and agricultural development; stream-belt surveys to provide basic data for inland wetland protection; soil conservation and critical erosion control along roads and highways; improved forestry practices; flood protection measures; development of public and private outdoor recreational opportunities; and the maintenance and development of a high quality natural environment for rural and urban activities, including housing, manufacturing and services.

The King's Mark Project area of 951,875 acres includes forty-seven towns, five planning regions and involves four soil and water conservation districts. It covers most of Litchfield County and parts of Fairfield, New Haven and Hartford Counties. The project will be administered by an Executive Committee of fourteen residents of the area representing planning regions, soil and water conservation districts and the area at large. A professional coordinator will be appointed through the U.S. Soil Conservation Service to carry out the policy decisions of the Executive Committee. Formation of the committee is expected to be completed by early February of 1974.

#### HUNTING

Open season for crow hunting in Connecticut runs from January 1 - February 19. The U.S. Fish and Wildlife Service has allotted a 124 day season for crow hunting, leaving the designation of specific dates to each state. Connecticut will establish the dates for the remainder of the 1974 season after DEP's annual hearing on upland game regulations held in June.

## PUBLICATIONS

Available from DEP, Room 110 unless otherwise noted.

An Explanation of the Inland Wetlands and Water Courses Act (P.A. 72-155 as amended by P.A. 73-571).

Citizen Action Guide to Energy Conservation (\$1.75) from the Superintendent of Documents, U.S. Government Printing Office, Washington, D. C. 20402.

Control of Air Pollution from New Motor Vehicles and Engines - Federal certification tests results, including mileage figures for each car, for 1974 model year. May be seen at Room 110, DEP, or in the Federal Register of November 5, 1973 in your local library. This is a 30-page document and cannot be reproduced efficiently in large quantities.

Enjoy Your Fireplace, Especially During the Energy Crisis. Excellent little pamphlet on acquiring wood, building fires, heat value of various kinds of wood. From U.S. Forest Service, Upper Darby, Penn. 19082.

The Environment of Fairfield County - an Introduction for Improvement and Control prepared by the Pollution Solution Group, Fairfield County Section, American Institute of Chemical Engineers. Brief discussion of sources of pollutants, technology of pollution control, and role of engineers in that control, with direction to consultants. \$1.00 from Fairfield County Section, American Institute of Chemical Engineers, 345 East 47th St., New York City 10017.

State of Connecticut Fuel Conservation Guide The Off-Road Vehicle and Environmental Quality by Malcolm F. Baldwin and Dan H. Stoddard, Jr. Excellent in-depth exploration of off-road vehicles, their environmental effects, recommendations and large chart of state regulations for off-road vehicles. \$4 from the Conservation Foundation, 1717 Massachusetts Avenue, N.W., Washington, D. C. 20036. May be studied at DEP, Room 110.

CALENDAR - Public hearings, deadlines for comment, noteworthy dates

Hearings may be rescheduled, or planned too late for the Bulletin publication date; this does not, therefore, pretend to be a complete or official list. It is wise to call and check scheduling before attending a hearing; for details call 566-4017 or number listed. Some hearings may be completed before you receive this Bulletin; they are included to provide a continuous record of department activities.

January 3 deadline for comments on application of Town of Montville to construct, install and maintain a 24-inch outfall sewer approximately 1100 feet long buried a minimum of 2 feet below the river bottom in Horton Cove of the Thames River in Montville. Excavated material to be used as backfill. Further information 566-5308.

January 17 9 a.m. - 5 p.m. Public discussion of Coastal Zone Management criteria. See page 3.

January 17 10 a.m. Hearing on application of Robert Geffken to discharge 300 gallons per day of treated domestic sewage to the groundwater in the watershed of the E. Aspetuck River (Lake Waramaug) in Warren. ROOM 129, STATE OFFICE BUILDING, HARTFORD

January 17 11 a.m. Hearing on application of Robert Eden to discharge 300 gallons per day of treated domestic sewage to the groundwater in the watershed of Lake Waramaug in Warren. ROOM 129, STATE OFFICE BUILDING, HARTFORD.

January 20 Deadline for comment on application of McCoombs Marina to relocate piers, ramps and floats; all structures covered by previously issued certificates. Further info. 566-5308.

January 31 7:30 p.m. Hearing on proposed regulations for registration and use of certain pesticides. See page 4.

February 7 7:30 p.m. as January 31 hearing See page 4.

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Department of Environmental Protection  
State Office Building  
Hartford, Connecticut 06115

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